86-312

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

UNITED STATES

v.

LILLIAN WIGGINS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

W. GARY KOHLMAN

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33 pp

QUESTION PRESENTED

Whether the immunity offered by the government to petitioner under Title 18 U.S. Code §6002 (1982) is coextensive with her Fifth Amendment Rights where (1) The subpoena compels the production of tapes in the alleged possession of petitioner, (2) the District Court has found that the government presently cannot independently prove the existence of the tapes, (3) the District Court has found that after the tapes are produced the government will not be able to independently prove their existence, and (4) the District Court concluded that the government's offer of immunity was illusory because the immunity was not and could not be coextensive with her Fifth Amendment Rights.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. -

IN RE: SEALED CASE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Petitioner Lillian Wiggins petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-7a) is not yet reported. The opinion of the district court (App., *infra,* 8a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *

STATEMENT

1. A federal grand jury in the District of Columbia is investigating alleged improprieties involving the District of Columbia Lottery and Charitable Games Control Board ("Lottery Board"). Petitioner is a former member of the Lottery Board and a target of the grand jury investigation.

In 1981, legislation of the City Council of the Distirct of Columbia was approved by Congress which authorized the Lottery Board to establish and run certain forms of legalized gambling. The Lottery Board consists of five members, each with one vote. The Lottery Board not only approves regulations establishing the format for the legalized gambling games, but awards contracts to independent contractors to create and run legalized gambling games.

Petitioner was appointed by Mayor Marion Barry to a two-year term to the Lottery Board in the spring of 1981. She continued to serve on the Lottery Board until October, 1983.

In March, 1982, the Lottery Board issued requests for bids on what was to be the first legalized gambling game in the District of Colubmia. The winning bid was filed by a joint venture, Scientific Games, Inc., of Atlanta, Georgia, and Games Productions, Inc., of Washington, D.C. Petitioner cast one of three votes in favor of Scientific Games, Inc./Games Production, Inc.

Games Production, Inc., sub-contracted the advertising for the gambling game to the LaMancha Group. In the summer of 1983 the United States Attorney's Office for the District of Columbia began investigating the manner in which bids had been approved by the Lottery Board. In regard to petitioner, the investigation focused on an allegation that in December, 1982, she had received a fur coat from a member of the LaMancha Group, Theresa Suter.

Petitioner and Theresa Suter both voluntarily testified before the grand jury in February, 1984, after receiving assurances that there would be a prompt resolution of that investigation. To date, however, no indictment has been returned, and petitioner has not been notified that the investigation has been closed.

In 1984, petitioner received a grand jury subpoena directing her to produce:

> all tapes concerning any recorded conversation between yourself and any other person(s) pertaining to the District of Columbia Lottery and Charitable Games Control Board, including but not limited to its votes, operations, contracts, requests for proposals and any form of compensations, remuneration, gift, donation or other payment received or given by any member or employee of the Board.

On November 1, 1984, petitioner moved in the United States District Court for the District of Columbia to quash the subpoena, contending that it violated her Fifth Amendment privilege against self-incrimination as to both the contents of the tapes and the act of producing them. On December 14, 1984, the Honorable Aubrey E. Robinson, Jr., Chief Judge, granted petitioner's motion as to the act of producing the tapes, and denying it as to the contents. (App., *infra,* 11a-20a). The District Court specifically found that the government did not have sufficient evidence to independently establish the existence of the tapes.

On April 29, 1985, petitioner was served with a grand jury subpoena *duces tecum* identical to the original subpoena. Petitioner, again, moved to quash the subpoena, noting that at no time during the litigation had she ever conceded the existence *vel non* of the tapes.

The government moved for an order to compel and accompanied the motion with authorization under 18 U.S. Code §6002 (1982) that petitioner be given use immunity for the act of production compelled by the requested order.

On May 29, 1985, the District Court granted petitioner's motion to quash (App., *infra,* 8a-10a). The District Court concluded that the government had not established by competent evidence the existence of the tapes it sought, and would not be able to do so if the tapes were produced. The District Court concluded that the government's grant of immunity was not and could not be coextensive with her Fifth Amendmnent right against self-incrimination.

The United States appealed that order pursuant to 18 U.S.C. .§3731.

2. On May 20, 1986, the court of appeals reversed the order of the District Court quashing the subpoena (App., *infra,* 1a-7a). The court of appeals instructed the District Court to grant the government's §6003 motion for an order compelling petitioner to produce the tapes.

Relying on this Court's decision in *Kastigar v. United States,* 406 U.S. 441 (1972), the Court held that "district courts are without discretion to deny a request by a United States Attorney for an order compelling testimony so long as that request complies with the jurisdictional and procedural requirements of the law." (App., *infra,* 4a-5a). The court of appeals did not disagree with the District Court's finding that petitioner's privilege against self-incrimination cannot be protected without excluding the contents of the tapes, but held that that was not a matter which could be dispositive before the tapes were produced, but rather must wait for consideration by the District Court until after the government had gained access to them.

The court of appeals acknowledged that its holding was inconsistent with a decision of the panel of the Seventh Circuit in *United States v. Porter,* 711 F.2d 1397 (1983).

3. On June 23, 1986, the District Court granted the government's motion under 18 U.S.C. §6003 for an order compelling petitioner to produce tapes under a grant of use immunity with respect to the act of production (app., *infra,* 21a).[1]

REASONS FOR GRANTING THE PETITION

This case presents an important and frequently recurring question regarding the scope of the Fifth Amendment privilege against compelled self-incrimination when an individual is compelled to produce an item of evidence under a grant of use immunity even though a District Court has found that the grant is not and cannot be coextensive with the individual's Fifth Amendment right against self-incrimination. In holding that the petitioner must produce evidence notwithstanding the District Court's undisturbed finding that the use immunity granted her was not coextensive with her Fifth Amendment right against self-incrimination, the court of appeals has misread the protections Congress and this Court have assumed were in 18 U.S.C. §6002. In essence, the court of appeals has reduced the District Court to functioning in no more than a ministerial capacity once the government has obtained a §6002 grant of immunity. The result reached by the court of appeals is not only a misreading of this Court's decision in *Kastigar,* but is in conflict with a decision in another circuit. *See United States v. Porter, supra.* Prompt correction of the court of appeals' decision is accordingly needed.

---

[1]Petitoner has moved to stay that order pending the outcome of this petition.

1. The court of appeals held that in light of the holding in *Kastigar,* a District Court must grant a government §6003 motion for an order compelling the production of evidence even if the District Court has concluded that there is no means by which the government could use that evidence that would not violate petitioner's Fifth Amendment rights. *Kastigar,* we submit, is not that sweeping.

The government seeks access to tapes allegedly made by petitioner while she was a member of the Lottery Board. Petitioner has never conceded the existence of the tapes. The existence of the tapes is not a foregone conclusion. In two years of litigation, the government has been unable to independently prove the existence of the tapes. The District Court has found that should the government later seek to use any incriminating contents of the tapes against petitioner in a criminal trial, it will not be able to establish the existence of the tapes by an independent source.

In light of those findings, the District Court concluded that the government's offer of use immunity for the act of production of the tapes was not coextensive with her Fifth Amendment right against self-incrimination. The District Court was following the holding of *Kastigar* that "a grant of immunity must afford protection commensurate with that allowed by the privilege. . ." (406 U.S. at 453).

Before the government can use the contents of the tapes against petitioner in a criminal trial, it must prove the existence of the tapes independent from petitioner's act of production. There are circumstances, and the District Court found that this is one of them, where the government will not be able to independently prove the existence of the tapes, and thus the contents of the tapes are shielded. *Fisher v. United States,* 425 U.S. 391, 433-434 (1976) (Marshall, J., concurring in the judgment).

The court of appeals, while leaving undisturbed the District Court's finding that the government will never be able to prove the existence of the tapes independent from petitioner's act of production, nonetheless held that the District Court must order the tapes produced. Neither the case the court of appeals relied upon, *Kastigar,* nor logic, support that result.

Kastigar, after tracing the history of the Fifth Amendment privilege against compulsory self-incrimination and the many immunity statutes in force prior to 1970, construed the immunity provisions set forth in the Organized Crime Control Act of 1970, Pub.L. No. 91-452 §201(a), 84 Stat. 922, 926-28 (codified at 18 U.S.C. §§6001-6005 (1982)). The Supreme Court concluded that it was Congress' intent that §6002 immunity for use and derivative use be "coextensive with the scope of the privilege against self-incrimination." (406 U.S. at 453).

The *Kastigar* Court further held, however, that if the immunity granted in §6002 was "not as comprehensive as the protection afforded by the privilege," then the recipient of the immunity would be entitled to assert the privilege. (406 U.S. at 449).

Kastigar itself acknowledges that not in every case will the immunity conferred by §6002 be coextensive with the recipient's Fifth Amendment privilege, for it held that after the government had gained access to compelled testimony as evidence, it could not use it unless it established that it had an independent, legitimate source for the evidence. (*Id.* at 460).

There is nothing in *Kastigar* that suggests that the District Court plays only a ministerial role in this process. Indeed, to the contrary, this Court in *Kastigar* clearly envisioned District Courts playing an essential role in ensuring

that §6002 immunity was coextensive with the Fifth Amendment privilege against compulsory self-incrimination. Here, the District Court discharged that duty, and determined that the grant of immunity was "illusory." The District Court's approach to this issue was more consonant with the spirit and holding of *Kastigar* than that of the court of appeals.

2. The court of appeals decision rejects the analysis of the Seventh Circuit to a similar issue in *United States v. Porter, supra.* We submit that it is the analysis in *Porter, supra,* and not the holding below, which is more consistent with *Kastigar* and the Fifth Amendment.

In *Porter, supra,* the court of appeals reversed an order directing a taxpayer to comply with summonses demanding production of business records. The court was concerned that, while the existence of the records was not in dispute, the taxpayer, by producing the records, would explicitly authenticate them, and that nothing in the immunity statute "would prohibit the government's reference to (as opposed to evidentiary 'use' of) [the taxpayer's] having produced the documents." (711 F.2d at 1404).

The court of appeals concluded that §6002 was not coextensive with the taxpayer's Fifth Amendment privilege against self-incrimination. It held that before the taxpayer could be compelled to produce the records, it would specifically require:

> "Not only must [the taxpayer] be granted statutory use immunity with respect to these documents, but also the court must fashion a protective order forbidding the government from referring in any way before the grand jury or at trial to the fact that [the taxpayer] produced the documents.

(Id.). Porter is consistent with *Kastigar,* for it mandates that the District Court be vigilant in insuring that §6002 immunity is coextensive with the rights secured by the Fifth Amendment. The District Court's order fully complies with the *Porter* requirements. The Court of Appeals, however, ignored the District Court's careful findings. The consequence is a decision which markedly deviates from *Kastigar* and which should therefore, be reviewed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 21, 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia, was mailed, postage prepaid, to Michael W. Farrell, Esquire, United States Attorney's Office, 555 - 4th Street, N.W., Washington, D.C. 20001, and to the Office of the Solicitor General, Department of Justice, Constitution Avenue and 10th Streets, N.W., Washington, D.C. 20530, on this 19th day of July, 1986.

W. GARY KOHLMAN

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5755

IN RE SEALED CASE

Appeal from the United States District Court for the District of Columbia

(D.C. Misc. No. 84-2786)

Argued Januarry 6, 1986
Decided May 20, 1986

Kenneth J. Melilli, Assistant United States Attorney, of the Bar of the District of Colubmia, *pro hac vice,* by special leave of this court, with whom *Joseph E. diGenova,* United States Attorney, *Michael W. Farrell, Thomas J. Tourish, Jr.* and *David Eisenberg,* Assistant United States Attorneys, were on the brief, for appellant.

W. Gary Kohlman for appellee.

Before: Wald, Scalia and Silberman, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* Scalia.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

SCALIA, *Circuit Judge:* The government appeals an order of the United States District Court for the District of Columbia quashing a subpoena that required appellee to produce tape recordings of conversations relevant to a pending criminal investigation. The District Court quashed the subpoena because, in its view, the immunity offered by the government under 18 U.S.C. § 6002 (1982) was not coextensive with appellee's fifth amendment privilege not to produce the tapes. The sole issue for our determination is whether that is so.

I

Late in 1984, appellee was served with a grand jury subpoena *duces tecum* demanding production of "all tapes concerning any recorded conversation between yourself and any other person(s)" pertaining to a certain matter. Appellee promptly moved for an order quashing the subpoena on the ground of fifth amendment privilege against self-incrimination with respect to both (1) the contents of the tapes and (2) the act of producing them. On December 14, 1984, the District Court granted the motion on the later ground alone. *See In re Grand Jury Subpoena,* Misc. No. 84-276 (D.D.C. Dec. 14, 1984). Applying the analysis set forth by the Supreme Court in *United States v. Doe,* 465 U.S. 605 (1984), and *Fisher v. United Stes,* 425 U.S. 391 (1976), the court held that the act of producing the tapes was incriminating, in that it would convey information not already known to the government about the existence of the tapes. For the purpose of this appeal, the government concedes that the act of production is privileged.

Several months after the court issued its order, appellee was again served with a grand jury subpoena *duces tecum* demanding production of the tapes. On May 3, 1985, appellee moved to quash this second subpoena. In re-

sponse, the government moved under 18 U.S.C. §§ 6002-6003 (1982) for an order compelling appellee to produce the tapes under a grant of use immunity with respect to the act of production. The District Court again quashed the subpoena, on the ground that the government's offer of immunity was "specious."

> The existence of the tapes is in dispute. If [appellee] produces the tapes — even under a statutory grant of immunity — the existence of the tapes will be beyond doubt. If the government later seeks to use any incriminating contents of the tapes against [appellee] in a criminal trial, it will not be able to establish the existence of the tapes by an independent source. Nor will it have to do so as the existence of the tapes will be a foregone conclusion. Therefore, the government's offer of immunity is illusory.

In re Grand Jury Subpoena, Misc. No. 84-276, slip op. at 2 (D.D.C. May 29,1985).

The government appeals pursuant to 18 U.S.C. § 3731 (1982), arguing that the immunity offered fully protected appellee's fifth amendment privilege and therefore required production of the tapes.

II

Prior to 1970, over 50 federal immunity statutes were in force. *Kastigar v. United States,* 406 U.S. 441, 447 (1972). In order to regularize the immunization process and strengthen the hand of federal prosecutors, Congress enacted the Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 926-28 (codified at 18 U.S.C. §§ 6001-6005 (1982)). Under the scheme established by that Act, when a United States Attorney believes that a witness's testimony which may be necessary to the

public interest is likely to be withheld in reliance upon the privilege against self-incrimination, he may, with the approval of the Attorney General (or one of his designees), apply to a district court for an order compelling the witness to testify. *See* 18 U.S.C. § 6003(b). Upon such application, the statute provides that the court "shall issue . . . an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of this privilege against self-incrimination." 18 U.S.C. § 6003(a) (emphasis added). A witness ordered to testify

> *may not refuse* to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 U.S.C. § 6002 (emphasis added).

Obvously, such a scheme would present grave constitutional difficulties unless the immunity provided under the statute was completely sufficient to preserve witnesses' fifth amendment rights. But any doubts on that score were laid to rest by the Supreme Court in *Katigar.* There the witness refused to testify after being ordered to do so, contending that the scope of immunity provided by the statute was inadequate. The Supreme Court rejected the claim, holding that § 6002 immunity from use and derivative use "is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege." *Id.* at 453. Since *Kastigar,* the Supreme Court and the courts of appeals have

repeatedly instructed that the immunity provided in § 6002 fully protects witnesses from incrimination and therefore leaves witnesses no alternative but to testify. *See, e.g., Pilslbury Co. v. Conboy,* 459 U.S. 248, 254-55 (1983); *In re Daley,* 549 F.2d 469, 478, 481 (7th Cir. 1977), *cert. denied,* 434 U.S. 829 (1977); *In re Liddy,* 506 F.2d 1293, 1298, 1301 (D.C. Cir. 1974) (en banc). Thus, district courts are without discretion to deny a request by a United States Attorney for an order compelling testimony as long as that request complies with the jurisdictional and procedural requirements of the law. *See United States v. Hollinger,* 553 F.2d 535, 548 (7th Cir. 1977); *Daley,* 549 F.2d at 479; *United States v. Leyva,* 513 F.2d 774, 776 (5th Cir. 1975); *In re Grand Jury Investigation,* 486 F.2d 1013, 1016 (3d Cir. 1973), *cert. denied,* 417 U.S. 919 (1974).

Of course, should the government choose to prosecute a witness immunized under § 6002, the district court at that point must carefully consider what protective orders are necessary to effectuate the fifth amendment protection. The immunity provided by § 6002 "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect," *Kastigar,* 406 U.S. at 453, and "once a defendant establishes that he has testified under a grant of immunity, 'the prosecution [has] the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.' " *Pillsbury,* 459 U.S. at 255 (quoting *Kastigar,* 406 U.S. at 460).

The District Court in this case evidently confused its responsibilities in disposing of a § 6003 request with the responsibilities it would have, by reason of *Kastigar,* at a suppression hearing. It appears to have reasoned as follows: If production of the tapes is ordered, appellee will be giving incriminating testimony establishing the tapes' exis-

tence – something the government has thus far been unable to establish independently. If, in the future, the government decides to prosecute appellee, it will still be unable independently to prove the tapes' existence. However, the government *will* be able to introduce the unprivileged contents of the tapes, which will make proving the existence of the tapes unnecessary. Therefore, the moment appellee produces the tapes – even under a grant of immunity – the right against self-incrimination effectively disappears. The flaw in this reasoning is that the fact that the contents of the tapes are *unprivileged* does not mean that they will necessarily remain *untainted.* If the government prosecutes the appellee in the future, it will have to meet the "heavy burden," *Kastigar,* 406 U.S. at 461, of proving that all evidence it seeks to introduce is untainted by the immunized act of production.

The short of the matter is that the scope of immunity afforded by § 6002 is, by definition, whatever is necessary to protect the witness's privilege against self-incrimination; and that § 6003 requires the order to testify to be issued without inquiry as to what that scope might be, leaving that question for subsequent suppression hearings. Thus, if in fact appellee's privilege in the act of production cannot be protected without excluding the contents of the tapes (a point on which we express no opinion) the District Court has the authority to prevent the government from referring to or introducing those contents. But it does not have authority to prevent the government from gaining access to the tapes. *See United States v. Kember,* 648 F.2d 1354, 1361-63 (D.C. Cir. 19870) (per curiam); *Liddy,* 506 F.2d at 1301.

The perfect clarity of this matter is obscured only by the decision of a panel of the Seventh Circuit in *United States v. Porter,* 711 F.2d 1397 (7th Cir. 1983). There the court

reversed a district court order requiring a taxpayer to comply with summonses demanding production of his business records. The court determined that while the contents of the records were not privileged, the act of production would implicitly authenticate the records and therefore incriminate the taxpayer; and that nothing in the immunity statute "would prohibit the government's *reference* to (as opposed to evidentiary 'use' of [the taxpayer's] having produced the documents." *Id.* at 1404. The court's order

> specifically require[d] that, before the [documents] may be obtained for further investigation, not only must [the taxpayer] be granted statutory use immunity with respect to these documents, but also the court must fashion a protective order forbidding the government from referring in any way before the grand jury or at trial to the fact that the [taxpayer] produced the documents.

Id. As our earlier discussion has shown, the latter protection (to the extent it is needed to preserve the witness's privilege against self-incrimination) is automatically included within § 6002 itself. *Porter* is inconsistent not only with *Kastigar* and with the holdings of other Circuits, *see supra* at 4-5, but also with prior expressions of the Seventh Circuit itself. *See Hollinger,* 553 F.2d at 548; *Daley,* 549 F.2d at 479.

* * * * * *

The order of the District Court quashing the subpoena is reversed. The court is instructed to grant the government's § 6003 motion for an order compelling appellee to produce the tapes.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF A GRAND JURY SUBPOENA DIRECTED TO LILLIAN WIGGINS	MISCELLANEOUS NO. 84-0276

ORDER

Before the Court are two motions filed in the above-captioned matter. The United States has moved to compel document production by Lillian Wiggins, a prospective witness before the grand jury. Wiggins has moved to quash the subpoenas issued to her based on her fifth amendment privilege against self-incrimination.

Two subpoenas have been directed to Wiggins. The first subpoena demands production of "all tapes containing any recorded conversation between yourself and other person(s) pertaining to the District of Colubmia Lottery and Charitable Games Control Board." A subpoena nearly identical to this was served upon Wiggins and in an Order dated December 14, 1984, this Court quashed the subpoena. The Court held that production of the tapes in question would violate Wiggins' fifth amendment right against self-incrimination because the existence of the tapes was not a foregone conclusion and thus the act of production was incriminatory under *Fisher v. United States,* 425 U.S. 391 (1976).

The Court's earlier ruling is dispositve of the instant subpoena. The United States seeks to circumvent this holding by offering Wiggins statutory use immunity under

18 U.S.C. § 6003 as to the act of production. However, this offer is specious. The existence of the tapes is in dispute. If Wiggins produces the tapes — even under a statutory grant of immunity — the existence of the tapes will be beyond doubt. If the government later seeks to use any incriminating contents of the tapes against Wiggins in a criminal trial, it will not be able to establish the existence of the tapes by an independent source. Nor will it have to do so as the existence of the tapes will be a foregone conclusion. Therefore, the government's offer of immunity is illusory.

The United States relies on two cases and a law review note to establish the proposition that where the act of production is potentially incriminating, the government may cure any constitutional infirmity by immunizing the act of production itself. *See In re Grand Jury Subpoena Duces Tecum,* 722 F.2d 981, 988 (2d Cr. 1983); *In re Grand Jury Proceedings (Martinez),*. 626 F.2d 1051, 1056 (1st Cir. 1980); Note, *The Rights of Criminal Defendants and the Subpoena Duces Tecum: The Aftermath of Fisher v. United States,* 95 Harv. L. Rev. 683, 690 (1982). However, these authorities are not apposite here. The Second Circuit case involved the possession prong of *Fisher,* while the First Circuit case and law review note concerned the authentication prong. Here, the issue is whether the tapes exist, not whether they are in Wiggins' possession or whether they can be authenticated. Moreover, these authorities rely on *Katigar v. United States,* 406 U.S. 441 (1972), which expressly warned that "a grant of immunity must afford protection commensurate with that afforded by the privilege. . ." *Id.* at 453. Here the prospective grant of immunity would fail to protect Wiggins to the same extent as she is protected by her fifth amendment privilege. Therefore, the Court holds that the government's motion to compel pro-

duction of the tapes is denied and that Wiggins' motion to quash the subpoena demanding the tapes is granted.

The second subpoena calls for production of "all books and records. . . pertaining or belonging to the" Lottery Board. Wiggins has failed to present any argument to support quashing this subpoena and it appears to the Court that she enjoys no privilege protecting her from producing any such records in her possession. Therefore, the Court holds that the motion to quash the subpoena is denied in this respect and that the government's motion to compel production of the books and records is granted.

Therefore, it is by the Court this 29th day of May, 1985,

ORDERED, that the motion to quash the subpoena is GRANTED with respect to the tapes and DENIED with respect to the books and records; and it is

FURTHER ORDERED, that the motion to compel document production is DENIED with respect to the tapes and GRANTED with respect to the books and records.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

Filed
MAY 29 1985
Clerk, U.S. District Court
District of Columbia

United States District Court
for the District of Columbia
A TRUE COPY
JAMES F. DAVEY, CLERK
By /s/ Denis Curtis
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF A GRAND JURY SUBPOENA DIRECTED TO LILLIAN WIGGINS	:	MISC. NO. 84-0276

MEMORANDUM AND ORDER

Before the Court is the Motion to Quash Grand Jury Subponea filed by Lillian Wiggins, the Government's Opposition thereto, and supporting papers, Ms. Wiggins, an ertswhile member of the District of Columbia Lottery and Charitable Games Control Board, has been directed by a grand jury subpoena to produce tapes that allegedly exist of conversations between her and others pertaining to the D.C. Lottery Bord.

Ms. Wiggins opposes compliance with the subpoena on two bases, each grounded in the fifth amendment's prohibition against testimonial self-incrimination. The first basis is that disclosure of the content of the tapes would require her to be a witness against herself in contravention of the fifth amendment. The second basis is that the act of producing the tapes itself constitutes testimonial self-incrimination in violation of the fifth amendment because such production implicitly acknowledges that the tapes exist. For reasons discussed below, the Court rejects Ms. Wiggin's first argument concerning the contents of the tapes, but agrees that in this case and on the record before the Court, the act of producing the tapes would constitute testimonial self-incrimination in violation of the fifth amendment.

A. The Contents of the Tapes Are Not Privileged Under The Fifth Amendment

The moving papers and opposition thereto do not indicate the contents of the alleged tape recorded conversations. Wiggins avers that any such converations are "private," while the government contends that its evidence indicates that the conversations pertain to the activities of the D.C. Lottery Board. Regardless which of these depictions is accurate, the contents of the conversations do not give rise to a privilege not to comply with the subpoena.

To the extent that the contents of the conversatiosn are private and do not relate to the D.C. Lottery Board, they are not required to be produced by the subpoena, which only directs Ms. Wiggins to produce tapes relating to the activities of the Board.

To the extent the contents of the conversations do relate to the activities of the Board, it is settled that the key to determining whether the fifth amendment has been violated is not whether the words relate to private or to business matters, but whether they are communicated under compulsion. *United States v. Doe,* ____ U.S. ____, 104 S. Ct. 1237 (1984); *Andresen v. Maryland,* 427 U.S. 463 (1976); *Fisher v. Untied States,* 425 U.S. 391 (1976). Any recorded conversations were recorded upon Wiggins' own initiative and can hardly be said to have been compelled. Absent such a showing the contents of the tapes enjoy no fifth amendment privilege.

B. The Act of Producing the Tapes Constitutes Testimonial Self-Incrimination in Violation of the Fifth Amendment

In addtiion to arguing that the contents of the tapes are protected, Ms. Wiggins argues that the subpoena "compels

her to acknowledge the existence *vel non* of the tape recordings." Motion to Quash at 3. The Supreme Court recognized in *Doe* that "[a]lthough the contents of a document may not be privileged, the act of producing the document may be." ____ U.S. at ____, 104 S. Ct. at 1242. Production of tangible evidence in response to a subpoena may have a testimonial and incriminating effect of its own, quite apart from the incriminating effect of the contents. In such a case, the fifth amendment will protect an individual from compulsory production of the evidence. *United States v. Doe,* ____ U.S. ____, 104 S. Ct. 1237 (1984); *Fisher v. United States,* 425 U.S. 391 (1976); *Marchetti v. United States,* 390 U.S. 39 (1968); *United States v. Fox,* 721 F.2d 32 (2d Cir. 1983).

The principle that can be gleaned from the pertinent case law for determining whether the act of production is privileged is that the fifth amendment is implicated only when the act of production aids the government in proving its case. *See United States v. Doe,* ____ U.S. at ____ n. 13, 104 S. Ct. at 1243 n. 13 (where petitioner alleges that the existence, possession, and authentication of a document are not a "foregone conclusion," a rebuttable presumption is raised that a valid claim of privilege exists); *United States v. Fox,* 721 F.2d at 38 (a "broad-sweeping summons" in which the government attempts "to compensate for its lacl of knowledge by requiring [the petitioner] to become the primary information against himself . . . . is precisely the sort of fishing expedition the Fifth Amendment was designed to protect").

In this case, the evidence the government has presented does not establish by any means tht the existence of the tape recorded conversations is a "foregone conclusion." *Fisher v. United States,* 425 U.S. at 411. The evidence consists of two affidavits. One reveals a suspicion held by an

acquaintance of Ms. Wiggins that she had recorded Board related conversations. The other affidavit – riddled with hearsay – also indicates at best a likelihood that the tapes exist.

The facts of the present case differ markedly from those in *Fisher.* In *Fisher,* the documents demanded were the analyses of income and expenses that had been copied from deposit receipts and cancelled checks. These had been prepared by the accountant, belonged to him and were of the kind usually prepared by accountants in the course of preparing the tax returns of their clients. Indeed, petitioner's tax returns hardly could have been compiled without these records. At no time did the petitioner assert that the records did not exist nor was there any question that they existed. It was in light of this overwhelming evidence that the Court concluded that "[t]he existence and location of the papers are a foregone conclusion and the taxpayer adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers." *Id.* at 411.

In contrast there is at least a modicum of doubt that the tapes allegedly prepared by Ms. Wiggins exist. No one except Ms. Wiggins has seen the tapes or heard their contents. Although the government's affidavits indicate the tapes exist, they by no means definitvely establish the fact of their existence. Moreover, there is no other evidence, such as the completed tax returns in *Fisher,* from which one can infer the existence of the tapes. Thus, there is no basis for concluding that the existence or possession of the tapes is a "foregone conclusion."

The conclusion that production of the tapes by Ms. Wiggins would constitute testimonial self-incrimination in violation of the fifth amendment is supported by the relevant case law. In *United States v. Nixon,* 418 U.S. 683

(1974), the Supreme Court enforced a subpoena directing the President of the United States to produce tape recorded conversations relating to an alleged conspiracy to obstruct justice only upon a very specific showing of particularity. The subponea required recordings of "certain precisely identified meetings between the President and others." *Id.* at 688. Moreover, the Special Prosecutor was prepared to fix the time, place, and persons present at the meetings based upon White House logs and appointment books in his possession.

Likewise, in *United States v. Fox,* 721 F.2d 32 (2d Cir. 1983), petitioner's tax returns indicated he possessed detailed extant records. Nevertheless, the court refused to enforce the subpoena absent a showing that the IRS could prove independently the nature and extent of petitioner's records:

> The inference we draw from this broad sweeping summons is that the government is attempting to compensate for its lack of knowledge by requiring Dr. Fox to become the primary informant against himself.

Id. at 38.

Also consistent with this conclusion is the holding in *United States v. Schlansky,* 709 F.2d 1079 (6th Cir. 1983). In *Schlansky,* an IRS summons required production of:

> A ring binder containing 8" x 12" sheets (approximate), 3 inches deep, containing cancelled checks, bank statements, invoices, receipts glued to the accountant's worksheets for the years 1976 and 1977."

Based on the specificity of this request, it was apparent to the court that the act of production would not offend the fifth amendment because it did not "confirm that which

was previously unknown to the government. . . ." *Id.* at 1084. *See also In re Grand Jury Proceedings,* 626 F.2d 1051, 1055 (1st Cir. 1980) (where secretary who prepared appointment books had testified as to their existence, admission by petitioner of the existence of the books was "so trivial that the Constitution was not implicated"); *In the Matter of Grand Jury Subpoena Duces Tecum Served Upon John Doe,* 466 F. Supp. 325 (S.D.N.Y. 1979) (a subpoena that requests "all records of any kind" in connection with a grand jury investigation of illegal labor payments constitutes testimonial self-incrimination because the government does not know what records will be produced and the subpoena forces the petitioner to compile papers and acknowledge their existence).

In light of the foregoing, the Court concludes that the production by Ms. Wiggins of the tapes would constitute testimonial self-incrimination in violation of the fifth amendment. Because the government has not established that the existence and possession of the tapes are a "foregone conclusion," the Court need not address the issue of authentication.

An appropriate Order accompanies this Memorandum.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

DATE: December 14, 1984

FILED
DEC 14 1984
JAMES F. DAVEY, Clerk

United States District Court
for the District of Columbia
A TRUE COPY
JAMES E. DAVEY, CLERK
By /s/ Jamees J. Crowley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF A GRAND JURY SUBPOENA DIRECTED TO LILLIAN WIGGINS	MISC. NO. 84-0276

ORDER

Before the Court is the Motion to Quash Grand Jury Subpoena filed by Lillian Wiggins, the Government's Opposition thereto, and the supporting papers. On the record before the Court, and as discussed in the accompanying Memorandum, it shall be and hereby is this 14th day of December, 1984,

ORDERED, that the Motion to Quash Grand Jury Subpoena is GRANTED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

FILED
DEC 14 1984
JAMES F. DAVEY, Clerk

United States District Court
for the District of Columbia
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JAMES E. DAVEY, CLERRK
By James J. Crowley

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF A GRAND JURY SUBPOENA DIRECTED TO LILLIAN WIGGINS	:	MISC. NO. 84-0276 (Under Seal)

ORDER

Upon consideration of the Opinion of the United States Court of Appeals for the District of Columbia Circuit in the above captioned case, it is by the Court this 23rd day of June, 1986,

ORDERED, that the Government's Motion under 18 U.S.C. § 6003 for an order compelling defendant to produce tapes under a grant of use immunity with respect to the act of production is GRANTED.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
Chief Judge

FILED
JUNE 23 1984
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

United States District Court
for the District of Columbia
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By Phyllis Brown

Supreme Court, U.S.
FILED
SEP 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-312

In the Supreme Court of the United States

OCTOBER TERM, 1986

LILLIAN WIGGINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that a use immunity order entered under the federal immunity statute, 18 U.S.C. 6002-6003, was inadequate to displace her Fifth Amendment privilege against compulsory self-incrimination.

1. On October 30, 1984, petitioner was served with a subpoena duces tecum to appear before the federal grand jury in the District of Columbia. The subpoena called for petitioner to produce tape-recordings of conversations between herself and other persons pertaining to the operations of the District of Columbia Lottery Board. Upon petitioner's motion, the district court quashed the subpoena on the ground that her act of producing the tapes would be incriminating because it would convey information not already known to the government about the existence of the tapes (Pet. App. 11a-17a).

On April 29, 1985, petitioner was again served with a grand jury subpoena demanding production of the tapes. When petitioner moved to quash this second subpoena, the government moved under 18 U.S.C. 6003 for an order

compelling her to produce the tape-recordings under a grant of use immunity. The district court again quashed the subpoena, finding that the prospective grant of immunity would not protect petitioner to the same extent as the privilege against compulsory self-incrimination (Pet. App. 8a-10a).

On May 20, 1986, the court of appeals reversed the order quashing the subpoena (Pet. App. 1a-7a). The court noted that "the scope of immunity afforded by § 6002 is, by definition, whatever is necessary to protect the witness's privilege against self-incrimination" (*id.* at 6a). Therefore, the court held, Section 6003 "requires the order to testify to be issued without inquiry as to what that scope might be, leaving that question for subsequent suppression hearings" (Pet. App. 6a). For that reason, the court added, if petitioner's privilege in the act of production "cannot be protected without excluding the contents of the tapes (a point on which we express no opinion) the District Court has the authority to prevent the government from referring to or introducing those contents. But it does not have authority to prevent the government from gaining access to the tapes" (*ibid.*). Accordingly, the court of appeals instructed the district court to grant the government's motion compelling petitioner to produce the tapes (*id.* at 7a).

2. Petitioner contends (Pet. 5-9) that the immunity granted under 18 U.S.C. 6002 was not coextensive with her privilege against compulsory self-incrimination, and that the court of appeals therefore should not have ordered her to produce the tape-recordings. This Court, however, has repeatedly held that the immunity granted by the federal use immunity statute is sufficient to displace the privilege against compulsory self-incrimination and thus to justify an order compelling the immunized witness to comply with a subpoena. See *United States* v. *Doe,* 465 U.S. 605, 617 n.17 (1984); *Pillsbury Co.* v. *Conboy,* 459

U.S. 248, 254-255 (1983); *United States* v. *Apfelbaum*, 445 U.S. 115, 123 (1980); *Kastigar* v. *United States*, 406 U.S. 441, 453-459 (1972).

Although petitioner claims (Pet. 7) that the immunity conferred by Section 6002 is not always coextensive with the witness's Fifth Amendment privilege and that the courts are not restricted to a ministerial role in the immunity process, this Court has held to the contrary. See *United States* v. *Doe*, 465 U.S. at 614-615, 616; *Pillsbury Co.* v. *Conboy*, 459 U.S. at 254-255 & n.11; *Kastigar* v. *United States*, 406 U.S. at 453. As the court of appeals correctly noted, the use immunity statute grants whatever protection is necessary to satisfy the constitutional requirements. If the government makes improper use of the immunized statements or conduct of the witness, the subsequent proceedings against the witness may be challenged on the ground that they are tainted by that improper use. See *Kastigar*, 406 U.S. at 460-462. We do not believe that the use of the tape-recordings against petitioner will prove to be improper; nonetheless, if petitioner is correct in her assertion that the tape-recordings cannot constitutionally be used against her in any way, she will be entitled to that relief after she produces them. And even if she is correct on that score, her concerns should not prohibit the government from obtaining the recordings for other legitimate purposes, such as using them against other persons.

Petitioner contends that the decision of the court of appeals in this case is inconsistent with the decision of the Seventh Circuit in *United States* v. *Porter*, 711 F.2d 1397 (1983). In that case, the Seventh Circuit expressed concern that the federal immunity statute might not grant sufficient protection against the incriminatory effects of a witness's act of producing subpoenaed materials. The court therefore required the district court to formulate a protective order that would ensure that the witness's Fifth

Amendment privilege would be fully secured. The *Porter* case, however, was decided before this Court's decision in *United States* v. *Doe, supra.* In the *Doe* case, this Court stated that the federal use immunity statute is fully effective to protect against the direct or indirect use of any incriminating feature of a witness's act of producing subpoenaed materials. See 465 U.S. at 614-615, 617 n.17. That ruling put to rest concerns of the sort expressed by the Seventh Circuit regarding the scope of the federal immunity statute.

Under the authority of the *Doe* case, there is no longer any question that a federal immunity order is sufficient, without more, to displace a witness's Fifth Amendment privilege. The court of appeals was therefore correct in directing that petitioner should be compelled to produce the tape-recordings, and it is unlikely that any other circuit would reach a contrary result.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

SEPTEMBER 1986

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